United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7341

United States Court of Appeals
FOR THE SECOND CIRCUIT

ARISTEDES A. DAY, THEODORA DAY and CONSTANTINE DAY, individually and ARISTIDES A. DAY and THEODORA DAY parents of CONSTANTINE DAY,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.

Defendant-Appellant.

KATE KERSEN, individually and as Administratrix and Administratrix Ad Prosequendum of the Estate of Elbert Kersen, deceased,

Plaintiff-Appellee,

against

TRANS WORLD AIRLINES, INC.

Defendant-Appellant.

JOHN SPIRIDAKIS, BESSIE SPIRIDAKIS, LEONARD LAZARUS, SHIRLEY LAZARUS, ARNOLD ROSE and HELEN ROSE,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.

Defendant-Appellant.

ON APPEAL FROM THE UNITES STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

UNITED STATES COURT OF APPEALS
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STATEMENT

Defendant-appellant Trans World Airlines, Inc. ("TWA") submits this brief in reply to the answering briefs of plaintiff-appellee Kersen ("Kersen Brief") and plaintiffs-appellees Day ("Day Brief").

III

ARGUMENT

Plaintiffs have cited not a single item of legislative history, not one statement by a delegate to the Warsaw Convention, not one scholarly article, nor even one case on point from any jurisdiction to support their view of Article 17. To counter the legislative history and various opinions of delegates, scholars and judges cited in TWA's main brief plaintiffs have relied on dictionary definitions and their unique, unsupported argument.

POINT I

A TREATY IS TO BE INTERPRETED TO EFFECTUATE ITS PURPOSES AND THE PARTIES' INTENT

Plaintiffs have completely failed to recognize in their briefs that what is involved in this case is a treaty of the United States, an international compact that

must be interpreted so as to give effect to the parties' intent. Instead of asking this Court to look to the numerous sources of ascertaining that intent as regards that phrase of Article 17 of the Warsaw Convention in issue here, plaintiffs turn to English dictionary definitions of the individual translated words of the phrase, taken out of context (Day Brief, pp. 14-15; Kersen Brief, p. 9).

As is clearly demonstrated at pages 36-37 of TWA's main brief, more than a dictionary must be used to interpret a treaty. The cardinal rule of treaty interpretation is to give effect to the drafters' intent and purposes of the treaty. In construing statutes the courts have steadfastly refused to make a "fortress out of the dictionary" and have instead looked to the legislative intent. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945); Georgia-Pacific Corp. v. United States Plywood Corp., 243 F. Supp. 500, 515 (S.D.N.Y. 1965) and cases cited therein. So too, common sense directs that dictionary definitions of individual words are not an aid to interpreting the meaning of a homogeneous phrase.

At issue in this case is the meaning of the phrase "took place . . . in the course of any of the operations of embarking or disembarking" as it is intended by Article 17 of the Warsaw Convention. Without dwelling on the issue of whether or not this English translation of the French

"s'est produit . . . au cours de toutes opérations d'embarquement ou de débarquement" accurately reflects the nuances of the authentic French text, it is obvious that the precise meaning of this phrase, taken as a whole, is subject to more than one interpretation: the district court below came to one interpretation; the district court in Pennsylvania having considered the decision below, came to another interpretation. Plaintiffs, armed only with a dictionary and their unsupported analysis, have construed the phrase to mean "any of the various formalities (such as checking the ticket, customs and searching) preliminary to boarding the aircraft." "Operation of embarking," however, can also mean the physical operation of stepping into the aircraft.* Since the phrase is not clear in itself, a dictionary is of no help in determining the drafters' inrent.

Similarly, plaintiffs would have this Court look to the common law and hold that the Warsaw Convention would apply to any person once they have attained the status of passengers (Day Brief, pages 19-20; Kersen Brief, pages 15-17).

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* At this point, it should be recalled that the word "any" ["toutes"] was inserted in the phrase to cover stops en route, and therefore plaintiffs reliance on the word is improper. See TWA's main brief, pp. 20-21. Similarly, the cases relied upon by plaintiffs (Day Brief, pages 19-20; Kersen Brief, pages 15-17) involving a carrier's liability under American common law for airplane, bus or subway accidents have no applicability to this treaty based on the civil law.

In support thereof plaintiff Kersen at pages 16-17 cites to Gold v. Swiss Air Transportation Co., Ltd., 33 App.Div.2d 777, 307 N.Y.S.2d 166 (2d Dep't 1969). Mrs. Gold flew to Spain where she disembarked and commenced a tour by land transportation. While using a roadside restroom facility Mrs. Gold was "violently precipitated towards the ground. . . ." (33 App.Div.2d at 778, 307 N.Y.S.2d at 167). Mrs. Gold did not base her cause of action on the Warsaw Convention. Nevertheless, the Kersen brief would argue that the purpose of the Convention was to cover a situation where a woman flies to Spain, takes a guided bus tour, gets off the bus and sits on a roadside restroom facility, where she is "violently precipitated towards the ground." Plaintiff would argue that the woman had not yet disembarked!

It is clear that a person may remain in the status of a "passenger" but not still be subject to the Warsaw Convention. MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971); Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95 (W.D. Pa. 1975). It is also clear that whether a person is under the "control" of the carrier or has been "accepted" by the carrier, or has had his ticket taken, and so on (Day Brief, page 16; Kersen Brief, page 9) relates solely to American common law notions of negligence and has no bearing whatsoever on what the drafters of the Warsaw Convention intended by Article 17. Indeed, a

striking reminder of this fact is the French case of Maché v. Air France, [1967] Revue Française de Droit Aérien 343 (Cour d' Appel de Rouen 1967), aff'd, [1970] Revue Française de Droit Aérien 311 (Cour de Cassation 1970). In Maché the injured plaintiff was still plainly in the "custody" of the airline, since he was being led by a stewardess from the plane to the terminal building. France's Supreme Court, however, determined that the Warsaw Convention did not apply because the accident did not take place on the traffic apron or as plaintiff was climbing up the boarding ladder into the aircraft. The Maché court did apply, however, the ordinary French law relating to carriers and allowed the airline to use the benefit of the limitation of liability provision in its contract with the passenger.

In its main brief, TWA has cited much evidence in support of its position that the drafters of the Convention never intended for it to extend to potential liability inside the airport buildings. This evidence falls into three basic categories: (1) the legislative history of the treaty itself, (2) subsequent statements by actual delegates to the Warsaw Convention, and (3) writings of air scholars from numerous different countries and legislative interpretation from Scandinavia and Germany. In addition, TWA has cited judicial decisions, both foreign and American.

Plaintiffs have cited not one item of legislative history, not one statement by a delegate to the Warsaw Convention, not one scholarly article, nor even one case from any jurisdiction to support thei. view of Article 17. Instead, plaintiffs Day have countered the authority against them by arguing that this Court should not consider so-called "extrinsic evidence," (Day Brief, pages 20-23). Plaintiff Kersen chooses generally to ignore the authorities cited (Kersen Brief, pages 12-15).

In the first instance where a treaty is subject to more than one interpretation, it is well settled that courts should look beyond the words themselves to ascertain what was intended by those words. The Supreme Court of the United States has consistently looked to the legislative history of treaties in an effort to interpret them properly. Kinkead v. United States, 150 U.S. 483 (1893); United States v. Texas, 162 U.S. 1 (1896); Terrace v. Thompson, 263 U.S. 197 (1923); Jordan v. Tashiro, 278 U.S. 123 (1928); Nielson v. Johnson, 279 U.S. 47 (1929); Todok v. Union State Bank, 281 U.S. 449 (1930); Santovincenzo v. Egan, 284 U.S. 30 (1931); Cook v. United States, 288 U.S. 102 (1933); Factor v. Laubenheimer, 290 U.S. 276 (1933).

The Supreme Court has also looked to the interpretation of a treaty given by the highest court of another

nation which is also a party to that treaty. Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1938) (looking to a decision of the Supreme Court of Canada).

In Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968), involving the interpretation of a phrase in the Warsaw Convention, extensive reference is made to the Convention's history, including the Minutes of the Convention, post-Convention statements by delegates and other numerous authorities referred to throughout the court's opinion. In rendering its decision, the court stated:

> "A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible. To fulfill that obligation and follow the consensus as to construction, the Court should resort to legislative history and to relevant extrinsic aids." 386 F.2d at 337-338.

Recognized authorities in international law have repeatedly indicated that extrinsic sources are properly used to establish the drafters' intent. Charles Cheney Hyde has written:

> "The ascertaining of the sense in which terms have been employed in a treaty involves a search for sources of interpretation. These may be found in what is extrinsic to the agreement. The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the

> common law abounds. As Professor Westlake has well said: 'The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilised world.'" 2 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 1471 (2d ed. 1945) (footnote omitted).

More specifically, Hyde has written:

> "Declarations made by the negotiators of a treaty at the time of exchange of ratifications, or subsequent thereto, concerning the sense in which it was understood that certain terms were employed are of value as sources of interpretation and should not be disregarded." Hyde, Concerning the Interpretation of Treaties, 3 Am. J. Int'l L. 46, 52 (1909) (footnote omitted).

Sir Hersch Lauterpacht has noted that the use of extrinsic sources is even more important for the judge interpretating an international agreement than one interpreting domestic legislation:

> "The availability of extrinsic evidence, including preparatory work, diminishes the burden placed upon him. It makes the resul dependent upon something more tangible than mere analysis of the text." Lauterpacht, Some Observations on Preparatory Work in the Interpretation of Treaties, 48 Harv. L. Rev. 549, 575 (1935).

It is obvious that the language of Article 17 by itself does not indicate at what point the drafters intended the Convention's regime of limited liability to begin. By the use of the available extrinsic evidence, however, as set forth at length in TWA's main brief, it becomes clear

that they did not intend for the Convention to extend to accidents taking place inside the buildings of the airport and that the only disagreement over the meaning of Article 17 is centered on whether the Convention is limited to accidents taking place when the passenger is climbing into and out of the aircraft or whether it extends to accidents on the traffic apron (See, TWA's main brief, pages 19-21).

An examination of the Convention's purpose reinforces this conclusion. The Convention was drawn up to limit the carrier's liability in cases of accidents involving international transportation, not for accidents taking place over 250 meters (two and a half football fields) away from the airplane, within the confines of a terminal building. The drafters of the Convention were well aware of the possibility of accidents taking place inside the airport buildings and Mr. Pecanha, Brazilian delegate to the Convention, specifically mentioned that fact in urging rejection of the C.I.T.E.J.A. draft article. (See main brief, pages 15-16). He cautioned his fellow delegates as to the choice they were making: "It is a question of saying whether the carrier's liability commences when the traveler enters the airport, which is a public place, or when he embarks on the aircraft." II Conférence Internationale de Droit Privé Aérien, 4-12 October 1929 (Warsaw 1939) at 56. The

drafters, therefore, were aware that it would make little sense, in a treaty relating to "International Transportation by Air," to have the treaty apply to areas far removed from the operation of the aircraft and that questions of liability in such areas should be left to local law.

This policy of the Convention is as valid today as it was in 1929. Then, as now, accidents occur both during and outside of the period of air transportation. The drafters purposely chose to exclude accidents taking place inside the terminal, long before embarking on the aircraft, and this Court should give effect to that intent.

POINT II

PLAINTIFFS' ARGUMENTS CONCERNING TWA'S AUTHORITIES ARE NOT PERSUASIVE

Plaintiffs do not even mention many of TWA's authorities cited in its main brief and they clearly fail to distinguish or discredit the others. Plaintiffs Day attempt to argue generally that extrinsic sources should not be considered by this Court, but the incorrectness of this position has been demonstrated above at pages 6-9. Plaintiff Kersen makes a variety of arguments, all of which must be dismissed.

First, it is argued that the categorical statement of the German delegate, Dr. Otto Riese, that the Convention

does not apply while the passenger "is in the airport terminal buildings," should not be considered because it appears in his book dated 1951. One need look no further than Block v. Compagnie Nationale Air France, supra, to find numerous examples of statements cited, many having dates later than 1951 and including a treatise by the very same Dr. Riese dated 1949. It should also be noted that Plaintiffs neglect to mention the statements of Amadeo Giannini and Dr. Wolterbeek-Müller, also delegates to the Warsaw Convention, dated 1932 and 1930, respectively, cited on pages 18 and 20 of TWA's main brief.

Plaintiff Kersen does mention the case of Maché v. Air France, supra, and Plaintiffs Day apparently are alluding to it when they argue that "the interpretation of a treaty rendered by one contracting party is not binding on another" (Day Brief, page 23). Plaintiff Kersen, on the other hand, makes three arguments: (1) the interpretation arrived at by the French Supreme Court was "wrong"; (2) the Court's interpretation was "dicta"; and (3) French "law" does not govern the meaning and scope of the Convention. (Kersen Brief, page 13).

In the first instance, TWA does not argue that the French court's decision is "binding" on this Court or that French law is to be "applied" here. Obviously, as a treaty

adhered to by the United States the Warsaw Convention is American law, although written in the French language. However, the interpretation given the Convention by France's highest court should be given great weight since that body of judges is particularly well suited to interpret a treaty drawn up and negotiated in French* and which is based on the civil law legal system. It is particularly significant to note, in fact, that the French court based its decision primarily on its investigation of the travaux préparatoires, or legislative history, of the Convention. [1967] Revue Française de Droit Aérien at 345. Moreover, because one of the two primary purposes of the Warsaw Convention is uniformity of application, even greater weight should be accorded the interpretation of France's highest court.

A reading of the Maché decision demonstrates clearly that the interpretation of the very same phrase involved here was the central issue decided in the case and therefore constituted the court's actual holding, not dicta, as argued by Plaintiff Kersen.

Finally, TWA submits that the French Supreme Court was correct in its interpretation and properly looked to the intent of the drafters to arrive at its decision.

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* The Convention minutes were, of course, reported only in French.

Plaintiff Kersen also refers to the other French case cited by TWA, Dame Forsius v. Air France, [1973] Revue Française de Droit Aérien 216 (Tribunal de Grande Instance de Paris 1973), and argues that it is not in point because there is no indication in the case as to whether or not the passenger had a boarding pass or the flight had been called. (Kersen Brief, pages 13-14). While there is no mention of these two details in the decision this is every reason to believe that she did have a boarding pass and that the flight had been called. Mrs. Forsius had had her travel documents checked and was in an area restricted to passengers who had cleared customs. In fact, she was undoubtedly closer to boarding her plane than the passengers herein since, after exiting the terminal building, they had to board an Olympic Airways bus which was to take them to the plane, over 250 meters away.

As a second argument, Plaintiff Kersen states: "Significantly, Forsius does not cite the earlier Maché case . . ." (Kersen Brief, page 14). However, it is the general rule in France that judges do not cite prior decisions in their opinions.*

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* This is so because under the civil law system the notion of stare decisis does not exist; French judges are not allowed to "make law," and by citing a prior case a judge would in effect be admitting that the prior case was "law." The French Civil Code specifically states that res judicata applies only to the instant case before the court

(Cont'd on following page)

Plaintiff Kersen also refers to three American cases cited by TWA, MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971); Felismina v. Trans World Airlines, Inc., 13 Av.Cas. 17, 145 (S.D.N.Y. 1974), and Klein v. KLM Royal Dutch Airlines, 46 App.Div.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974), and states that it "is significant that in none of the above cases cited by TWA were the passengers standing in line to get aboard the aircraft." (Kersen Brief, page 15.)

Such an argument is misleading as the plaintiffs here were not standing in line to board the aircraft, but were standing in line at the Greek government inspection area prior to being searched by Greek officials and prior to leaving the terminal to board a bus. Moreover, it is submitted that a reading of the three cases cited by TWA shows that they do in fact support TWA's position. (See, TWA's main brief, pages 27-29).

On pages 11 through 14 of their brief, plaintiffs Day cite various cases granting summary judgment under the Warsaw Convention. None of those cases involved people

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(Cont'd) from preceding page)

(French Civil Code, Article 1351) and that judges are forbidden from laying down legal rules (French Civil Code, Article 5). In fact, it is a criminal offense in France for a judge to usurp the legislative function (French Penal Code, Article 127). A reading of the Maché decision, or of other French cases, will illustrate the point that prior cases are not cited. See, generally, R. David and H. DeVries, The French Legal System 107-115 (Parker School of Foreign and Comparative Law, Columbia University 1954).

inside terminal buildings. In the Millikin Trust and McDivitt cases the passengers died, presumably, when the planes which carried them crashed. In McCarthy and Salmon, plaintiffs were injured as they jumped from the doors of the planes to the ground during emergency evacuations.

Plaintiffs have clearly failed to advance any supportable reasons why TWA's authorities should not be considered by this Court. These authorities, like the legislative history of the Convention are all evidence of the drafters' intent that the Warsaw Convention does not apply to accidents taking place while the passenger is still in the airport buildings. Plaintiffs have alleged separate claims based on negligence and these cases should be decided ultimately on that basis rather than under the Warsaw Convention, as the drafters of the Convention intended.

CONCLUSION

It is submitted that the Order of the court below should be reversed and partial summary judgment should be

granted defendant TWA on the grounds that the Warsaw Convention does not apply to the facts of this case.

Dated: New York, New York
September 30, 1975

Respectfully submitted,

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